

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 03-0438P
Negligence Penalty
For Years 1998, 1999 and 2000**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. Tax Administration- Ten Percent (10%) Negligence Penalty

Authority: IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b); 45 IAC 1.1-2-13; IRC 704; 45 IAC 1.1-2-4; 45 IAC 1.1-3-3; 45 IAC 3.1-1-153

The taxpayer protests the imposition of the ten percent (10%) negligence penalty.

STATEMENT OF FACTS

Taxpayer manufactures glass containers for food and beverages. Taxpayer has 18 manufacturing plants throughout the country, including two in Indiana. Taxpayer is a 50% owner in a partnership that manufactures glass bottles. Taxpayer is also a 49% owner in a limited partnership that manufactures, reconditions, and repairs molds used to make the containers. Taxpayer has a unitary relationship with the partnerships and files a unitary return with the same.

I. Tax Administration- Ten Percent (10%) Negligence Penalty

DISCUSSION

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts

and circumstances of each taxpayer.

For all three years under audit, taxpayer did not report the partnership distributions for gross income tax. 45 IAC 1.1-2-13 imposes gross income tax on the portion of the partner's distributive share of partnership income under Section 704 of the Internal Revenue Code that was derived from sources in Indiana. Accordingly, taxpayer was assessed and paid gross income tax on these distributions.

For 1998, taxpayer failed to report receipts from management fees characterized as other income for gross income tax at the high rate. 45 IAC 1.1-2-4 imposes gross income tax at the high rate on services of any kind. The management fees were earned for accounting and managerial services performed at the headquarters in Indiana. Taxpayer was assessed and paid gross income tax on these fees.

For 1998, taxpayer did not report miscellaneous income characterized as other income for gross income tax at the high rate. 45 IAC 1.1-2-4 imposes gross income at the high rate on other income taxpayer fails to segregate on its records. Indiana miscellaneous income was unavailable, so it had to be determined with the best information available. Taxpayer was assessed and paid gross income tax on this income.

For 1998, 1999, and 2000, taxpayer did not report sales shipped from locations outside the state to customers in Indiana for gross income tax. 45 IAC 1.1-3-3 imposes gross income tax on sales shipped in interstate commerce if the sales are channeled through, associated with, or otherwise connected to a business situs in Indiana. Taxpayer agreed that the sales were channeled through the headquarters in Indiana. Taxpayer was assessed and paid gross income tax at the low rate for these sales.

For 1998, taxpayer reported the net income from the partnership distribution from the 50%-owned partnership as a net loss rather than a net gain. No source for this error was discovered. Taxpayer was assessed and paid adjusted gross income tax on this distribution.

For all three years under audit, taxpayer did not add back the gross income deducted on the federal return to federal taxable income to determine Indiana adjusted gross income. For all three years, taxpayer failed to add back gross income tax deducted on the federal return or the pro rata share of state income tax deducted on the partnership return of the 49%-owned partnership to determine the net income of the 49%-owned partnership that is included in the taxpayer's final federal taxable income. Taxpayer was assessed and paid adjusted gross income tax on these items.

For 1998, taxpayer did not add back the pro rata share of property tax deducted on the partnership return of the 49%-owned partnership. Taxpayer was assessed and paid adjusted gross income tax on this item.

45 IAC 3.1-1-153 requires the inclusion of the pro rata share of the partnerships' property, payroll, and sales in the calculation of the partner's apportionment percentage if taxpayer and the partnership have a unitary relationship under established standards, disregarding ownership

requirements. The auditor found that taxpayer has the requisite control and flow of value with the partnerships to establish a unitary relationship which is evidenced by financial, managerial, and administrative functions provided by the taxpayer on behalf of the partnerships.

For 1998, taxpayer did not include the pro rata share of the 49%-owned partnership's property, payroll, and sales in its calculation of the Indiana apportionment percentage. Taxpayer agrees that there is a unitary relationship with the partnerships that requires inclusion of the partnership factors in the calculation of the Indiana apportionment percentage under 45 IAC 3.1-1-153. Taxpayer was assessed and paid adjusted gross income tax on these items.

Taxpayer's assertion is that, despite its numerous errors and oversights, it made a good faith effort to comply with the tax laws of Indiana. Taxpayer claims that it harbored no intent to defraud the State or deprive the State of tax revenues. However, as is stated in 45 IAC 15-11-2 (b), the standard is a negligence standard, not a standard of intentional misconduct. The regulation goes on to provide an example of negligence in "failure to reach and follow instructions provided by the department." In every case, taxpayer has shown it failed to comply with the written provisions of the Indiana Code and its corresponding regulations. Taxpayer has made no argument that the language in said provisions was ambiguous or misleading. In fact, in several instances taxpayer agreed with and admitted some of the auditor's more complex conclusions (e.g. the unitary nature of the business relationship).

Taxpayer has made no assertions that its actions were non-negligent, and in spite of that oversight, taxpayer has demonstrated its ignorance of the tax laws. Ignorance is not a defense to negligence.

FINDING

The taxpayer's protest is respectfully denied.